LINDE GAS MALAYSIA SDN BHD A

v.

PASIFIK UTAMA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
HASAN LAH JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-03-134-2007]
1 MARCH 2011 C

CIVIL PROCEDURE: *Striking out - Appeal against - Rules of the High Court 1980, O. 18 r. 19 - Whether pleadings herein revealed issues of law and fact requiring determination - Whether case obviously unsustainable or appropriate for disposal - Whether plaintiff abused court process by seeking redress - Whether plaintiff's claim vexatious or frivolous - Whether Judicial Commissioner erred in upholding the striking out of plaintiff's claim* D

ARBITRATION: *Jurisdiction - Jurisdiction of court - Whether ousted by an arbitration clause in contract - Whether defendants had submitted to jurisdiction of court and abandoned rights to arbitration - Arbitration Act 1952, s. 34 - Whether applicable* E

The plaintiff was served with an Arbitration Notice (AN) to the Kuala Lumpur Regional Centre for Arbitration (KLRCA) pursuant F to cl. 7 of a Carbon Dioxide Procurement Contract (the Procurement Contract) for alleged breach by the plaintiff. The plaintiff, who disputed the validity of the Procurement Contract (including the arbitration clause therein contained) and the jurisdiction of any arbitrator over the dispute between them filed G a writ of summons and statement of claim in the High Court. The defendants entered an unconditional appearance to the writ of summons. Subsequently, the defendants filed their statement of defence and summons in chambers to strike out the whole or part of the plaintiff's claim under O. 18 r. 19(b) and/or (d) of the Rules H of the High Court 1980. The Deputy Registrar allowed the defendant's application in part and struck out a substantive part of the plaintiff's claim. The plaintiff's appeal to the judge in chambers was dismissed by the judicial commissioner, hence the appeal to this court. It was the plaintiff's submission that the I validity of the arbitration clause must be decided before any

arbitration could take place, hence the filing of the writ of summons in court with the declarations sought for. According to the plaintiff, as the defendants not only filed unconditional appearance but also their statement of defence, they had taken steps in the proceeding and thus submitted to the court's jurisdiction and having done so they could not then contend that the court had no jurisdiction over the matter. The plaintiff also denied ever having acceded to any arbitration and that even the KLRCA recognised that the matter had to be decided by the court before any arbitration, therefore, s. 34(1) Arbitration Act 1952 (the AA 1952) did not apply. The plaintiff further submitted that this was not a proper case for striking out under O. 18 r. 19 of the Rules of the High Court 1980.

Held (allowing the appeal; setting aside the order of the High Court)

Per Tengku Baharudin Shah JCA delivering the judgment of the court:

(1) The appeal, being from an O. 18 r. 19 decision, should take guidance from the well settled principle applicable thereto. It is only in plain and obvious cases that recourse should be had to this summary process. The procedure could only be adopted when a claim is on the face of it 'obviously unsustainable.' If there is a point of law which requires serious discussion, objection should be taken on the pleading and the point set down for argument. The court must be satisfied that there was no reasonable cause of action or that the claims were frivolous or vexatious (*Bandar Builder Sdn Bhd v. UMBC*). (para 21)

(2) This was not a plain and obvious case in the defendants' favour. The pleadings herein revealed issues of law and fact which require determination. There were also issues as to whether the jurisdiction of the court was ousted by an arbitration clause in a contract, which existence or validity was challenged and whether the defendants who had submitted to the jurisdiction of the court had abandoned their rights to arbitration, could now deny the court's jurisdiction to determine the issue. The case was therefore neither on the face of it obviously unsustainable nor in the circumstances appropriate for disposal under O. 18 r. 19 of the Rules of the High Court 1980. (para 22)

(3) There was nothing frivolous or vexatious in the plaintiff seeking determination by the court of the legal status of the Procurement Contract/Arbitration Clause, that being the source of the arbitrator's jurisdiction and power resolving the dispute between them. The plaintiff did not abuse the court process by seeking redress there but the defendants did so by seeking to shut the plaintiff out after having themselves opted to abandon their recourse to arbitration. (para 25)

(4) Article 21 of the KLRCA Rules no doubt empowers an arbitral tribunal to rule on objection to its jurisdiction or determine the existence or validity of an arbitration contract/clause. But as pointed out in *Safege Consulting Engineers v. Ranhill Bersekutu Sdn Bhd* jurisdiction and power are distinguishable. The judicial commissioner had erred in rejecting the plaintiff's submission that the court retains the jurisdiction to determine the issue at hand. (para 30)

(5) In the instant case, there was neither an ongoing arbitration held at the KLRCA nor an international arbitration as contemplated by s. 34. Though the AN was served on the plaintiff, the plaintiff had not submitted to KLRCA's jurisdiction. On the contrary, the source of the arbitrator's jurisdiction was challenged as being null and *void ab initio*. There was no arbitration in progress at KLRCA. There was therefore no question of the court interfering with any arbitration at KLRCA so as to trigger the application of s. 34(1). (para 35)

(6) Clause 7 of the Procurement Contract expresses the intention of the parties to refer their dispute to a domestic arbitration and not an international one, the governing law being specified as the laws of Malaysia. Local arbitration may be conducted under the KLRCA Rules but s. 34 of the AA 1952 would not be triggered as that would be contrary to the parties' intention and the purpose of the section. The JC therefore erred in upholding the striking out of the plaintiff's claim on the ground that the court's jurisdiction was ousted by the arbitration clause and s. 34(1) of the AA 1952. (para 36)

(7) Appellate interference was in order to rectify the decision of the JC who had not only misconstrued the law but also misappreciated the facts. (para 38)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif telah disampaikan dengan Notis Timbangtara (NT) ke Pusat Timbangtara Serantau Kuala Lumpur (PTSKL) di bawah kl. 7 Kontrak Pemerolehan Dioksida Pengepungan (kontrak pemerolehan) atas dakwaan pelanggaran oleh plaintif. Plaintif, yang mempertikaikan kesahihan kontrak pemerolehan (termasuk klausa timbangtara yang terkandung di dalamnya) dan bidangkuasa mana-mana penimbangtara atas pertikaian di antara mereka memfailkan writ saman dan pernyataan tuntutan di Mahkamah Tinggi. Defendan-defendan memasuki kehadiran tanpa syarat ke atas writ saman. Kemudiannya, defendan-defendan memfailkan pernyataan pembelaan dan saman dalam kamar untuk membatalkan seluruh atau sebahagian dari tuntutan plaintif di bawah A. 18 k. 19(b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980. Timbalan Pendaftar membenarkan sebahagian dari permohonan defendan dan menolak satu bahagian substantif tuntutan plaintif. Rayuan plaintif kepada hakim dalam kamar telah ditolak oleh Pesuruhjaya Kehakiman oleh itu rayuan dibuat kepada mahkamah ini. Ia adalah hujahan plaintif bahawa kesahihan klausa timbangtara harus diputuskan sebelum apa-apa timbangtara boleh dikendalikan, oleh itu pemfailan writ saman di mahkamah dengan deklarasi-deklarasi yang dipohon. Menurut plaintif, oleh kerana defendan-defendan memfailkan kehadiran tanpa syarat dan pernyataan pembelaan, defendan-defendan telah mengambil langkah-langkah dalam prosiding dan telah menyerah kepada bidangkuasa mahkamah dan oleh itu defendan-defendan tidak boleh sekarang berhujah bahawa mahkamah tidak mempunyai bidangkuasa mengenai perkara itu. Plaintif juga menafikan bahawa plaintif telah menerima mana-mana timbangtara dan PTSKL mengiktiraf yang perkara itu perlu diputuskan oleh mahkamah sebelum apa-apa timbangtara, oleh itu s. 34(1) Akta Timbangtara 1952 (AT 1952) tidak boleh diterimapakai. Plaintif seterusnya berhujah bahawa ini bukanlah kes yang sesuai untuk dibatalkan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:

(1) Rayuan yang datangnya dari keputusan A. 18 k. 19, bimbingan sepatutnya diambil dari prinsip-prinsip mantap yang digunapakai. Jalan penyelesaian di bawah proses summary

hanya boleh digunakan apabila kes adalah terang dan jelas. Prosedur itu hanya boleh dipakai apabila tuntutan adalah pada permukaannya 'tidak boleh bertahan.' Jika terdapat satu perkara undang-undang yang memerlukan persoalan serius bantahan sepatutnya diambil ke atas pliding dan perkara dicatatkan untuk hujahan. Mahkamah mesti berpuas hati bahawa tidak terdapat kausa tindakan munasabah atau tuntutan-tuntutan adalah remeh dan menyusahkan (*Bandar Builder Sdn Bhd v. UMBC*).

(2) Ini bukan kes terang dan jelas yang memihak kepada pihak defendan. Pliding-pliding di sini menunjukkan isu-isu undang-undang dan fakta yang memerlukan penentuan. Terdapat juga isu-isu sama ada bidangkuasa mahkamah disingkir oleh klausa timbangtara di dalam kontrak, yang kewujudannya dan kesahihannya dicabar dan sama ada defendan-defendan yang telah menyerah kepada bidangkuasa mahkamah telah melepaskan hak-hak mereka kepada timbangtara, boleh sekarang menafikan bidangkuasa mahkamah untuk memutuskan isu. Oleh itu kes ini bukan pada permukaannya tidak boleh dipertahankan dan di dalam keadaan tidak sesuai untuk diputuskan secara terus di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980.

(3) Tiada apa-apa yang remeh atau menyusahkan mengenai permohonan plaintif untuk mahkamah memutuskan status undang-undang kontrak pemerolehan/klausa timbangtara, itu adalah sumber bidangkuasa penimbangtara dan kuasa untuk menyelesaikan pertikaian antara mereka. Plaintif tidak salahgunakan proses mahkamah dengan memohon pembetulan di sana tetapi defendan-defendan telah berbuat demikian dengan memohon untuk menolak plaintif keluar apabila defendan-defendan sendiri telah memilih untuk melepaskan hak-hak mereka kepada timbangtara .

(4) Artikel 21 Kaedah-Kaedah PTSKL memberi kuasa kepada tribunal timbangtara untuk memerintah satu bantahan kepada bidangkuasa atau untuk memutuskan kewujudan atau kesahihan kontrak/klausa timbangtara. Tetapi seperti yang telah dinyatakan di dalam *Safege Consulting Engineers v. Ranhill Bersekutu Sdn Bhd* bidangkuasa dan kuasa boleh dikenal beza. Pesuruhjaya Kehakiman salah apabila menolak hujahan plaintif bahawa mahkamah sepatutnya mengekalkan bidangkuasa untuk memutuskan isu.

(5) Di dalam kes ini, tidak ada satu timbangtara berterusan diadakan di PTSKL mahupun timbangtara antarabangsa seperti yang dipertimbangkan oleh s. 34. Walaupun NT telah disampaikan kepada plaintif, plaintif tidak menyerah kepada bidangkuasa PTSKL. Sebaliknya, sumber bidangkuasa penimbangtara dicabar dan dikatakan tidak sah dan terbatal. Tiada timbangtara dijalankan di PTSKL. Oleh itu tiada persoalan mahkamah menganggu apa-apa timbangtara di PTSKL untuk menggunapakai s. 34(1).

(6) Klausa 7 Kontrak Pemerolehan menyatakan niat pihak-pihak untuk merujuk pertikaian mereka ke timbangtara domestik dan bukan antarabangsa, undang-undang pemerintahan ditetapkan sebagai undang-undang Malaysia. Timbangtara tempatan boleh dikendalikan di bawah Kaedah-Kaedah PTSKL tetapi s. 34 AT 1952 tidak digunakan kerana itu bertentangan dengan niat pihak-pihak dan tujuan seksyen tersebut. Pesuruhjaya Kehakiman salah apabila mempertahankan penolakan tuntutan plaintif atas alasan bahawa bidangkuasa mahkamah telah disingkir oleh klausa timbangtara dan s. 34(1) AT 1952.

(7) Campurtangan rayuan diperlukan untuk memperbetulkan keputusan Pesuruhjaya Kehakiman yang bukan hanya menyalahtafsirkan undang-undang tetapi tersalah ambilkira fakta-fakta di hadapannya.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Jati Erat Sdn Bhd v. City Land Sdn Bhd [2002] 1 CLJ 346 HC ***(refd)***

Heyman v. Darwins [1942] 1 All 337 ***(refd)***

Klockner Industries - Anlagen GmbH v. Kien Tat Sdn Bhd & Anor [1990] 1 LNS 70 HC ***(refd)***

New India Assurance Company Ltd v. Lewis [1966] 1 LNS 115 FC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

Safege Consulting Engineers v. Ranhill Bersekutu Sdn Bhd [2004] 4 CLJ 699 CA ***(refd)***

Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***

Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 CA ***(refd)***

Soilchem Sdn Bhd v. Standard Electrik Lorenz AG [1992] 1 LNS 51 HC ***(refd)***
Tan Kong Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat [1996] 1 CLJ 231 FC ***(refd)***
Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd [1993] 4 CLJ 12 SC ***(refd)***
Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd [2004] 3 CLJ 591 CA ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 6, 34(1)
Arbitration Act 2005, s. 10(1)
Rules of the High Court 1980, O. 18 rr. 19(b), (d)

For the appellant - VS Chan (CW Lam with him); M/s Lee & May
For the respondent - Mahathir Abdullah; M/s Raslan Loong

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-22-1288-2004]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Baharudin Shah JCA:

[1] This is an appeal against the decision of the learned judicial commissioner (JC) who dismissed the appellant/plaintiff's (the plaintiff) appeal against the decision of the learned Deputy Registrar of the High Court (the DR) in striking out the substantive part of the plaintiff's claim against the respondent/defendants (the defendants) under O. 18 r. 19(b) and/or (d) of the Rules of the High Court 1980 (RHC). We heard arguments of learned counsel for the respective parties and came to a unanimous conclusion that the said decision was wrong and contrary to law. We therefore allowed the plaintiff's appeal with costs here and below and set aside the order. Consequently, we also dismissed the striking out application of the defendants.

Background

[2] The plaintiff was served with an arbitration notice dated 20 August 2004 (the AN) to the Kuala Lumpur Regional Centre for Arbitration (KLRCA) pursuant to cl. 7 of a Carbon Dioxide Procurement Contract dated 14 June 2000 (the procurement contract) for alleged breach by the plaintiff.

[3] The plaintiff who disputed the validity of the procurement contract (including the arbitration clause therein contained) and the jurisdiction of any arbitrator over the dispute between them filed a writ of summons and statement of claim on 25 August 2004 in the High Court seeking for the following prayers:

(a) A declaration that the procurement contract was null and void and that consequently cl. 7 thereof was also null and void and hence there was no agreement to arbitrate;

(b) A declaration that no arbitrator had authority to act or jurisdiction to make any award pursuant to the AN;

(c) A declaration that the KLRCA Rules had no application to the dispute between the defendants and the plaintiff;

(d) An injunction to restrain the defendants from threatening, committing, inducing, procuring breaches of or unlawfully interfering in the supply agreement dated 17 July 1997 between the plaintiff and Petronas (the supply agreement);

(e) General damages, interest and costs.

[4] The defendants entered an unconditional appearance to the writ of summons on 2 September 2004.

[5] On 9 September 2004 KLRCA wrote to the solicitors of the defendants and plaintiff notifying them that notwithstanding the AN no action would be taken until appropriate measures were taken in the High Court Civil Suit. The arbitration clause in the contract was however taken note of.

[6] The defendants filed their statement of defence on 10 September 2004 and subsequently filed summons-in-chambers (encl. 20) to strike out the whole or part of the plaintiff's claim under O. 18 r. 19(b) and/or (d) of the RHC. The DR heard and allowed the defendants' application in part in that prayers (a) to (c) and prayer (e) of the plaintiff's statement of claim were struck out. The plaintiff's appeal to the judge in chambers was dismissed by the learned JC, hence the appeal to this court.

The Plaintiff's Claim

[7] The plaintiff's case is that the validity of the procurement contract must be determined first, if it is declared to be void the purported agreement to arbitrate would also be void. In that event, neither the arbitrator nor KLRCA would have any jurisdiction.

[8] The procurement contract is alleged to be null and void for want of consideration, smacked of *mala fides*, was a sham document, and tantamount to corrupt practice. It was contended that documentary evidence showed that the purported agreement on 'procurement and commission' had nothing to do with the defendants nor the plaintiff. The plaintiff did not and could not engage the defendants to procure any supply agreement because at the time of the execution of the supply agreement the plaintiff was not even formed and was not in existence. The defendants were also not the procurers of the supply agreement.

[9] The plaintiff saw no justification for paying the defendants a 300% commission without consideration. The defendants had no right to impose another person's obligation onto the plaintiff as such commission was in return for management services rendered to that other.

[10] It was further contended that the filing of the unconditional appearance by the defendants amounted to submitting to the jurisdiction of the court. The court's jurisdiction cannot be ousted by agreement and any agreement to arbitrate did not bar the court's jurisdiction nor did it bar the institution of proceedings in the court.

The Defendants' Contention

[11] The defendants stand was that the arbitration clause must be read together with art. 21 of the KLRCA Rules and as such any dispute arising under the procurement contract must be referred to the arbitrator.

[12] They contended that the filing of the pleadings and affidavits by the defendants could not at law amount to a submission to the jurisdiction of the court in circumstances where the court had no jurisdiction to hear the dispute in any event. Therefore the plaintiff's claim was frivolous and vexatious and an abuse of the process of the court and should be struck out under O. 18 r 19.

JC's Finding

[13] The learned JC held the view that art. 21 of the KLRCA Rules empowers the arbitral tribunal to determine the very issue of the existence or validity of the procurement contract of which the arbitration clause forms part of. She relied on the authority of *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275, that s. 34(1) of the Arbitration Act 1952 (the AA 1952) excludes the jurisdiction of the court in cases that are before the KLRCA.

[14] She rejected the plaintiff's contention and held that in light of s. 34(1) of the AA 1952, the defendants' failure to file conditional appearance and to apply for stay of the proceedings did not estop the defendants from filing O. 18 r. 19 application and accordingly dismissed the plaintiff's appeal.

The Appeal

[15] Before us, learned counsel for the plaintiff submitted that the validity of the arbitration clause must be decided before any arbitration can take place, hence the filing of the writ of summons in court with the declarations sought for. As the defendants not only filed unconditional appearance but also their statement of defence, they had taken steps in the proceeding and thus submitted to the court's jurisdiction. Having done so they could not then contend that the court had no jurisdiction over the matter. It is common ground that the AA 1952 applies in this case as the events took place in 2004.

[16] It was thus submitted in the circumstances that the matter did not come under O. 18 r. 19(1) as the defendants had by so submitting to the court's jurisdiction opted for the issue to be determined by the court instead of arbitration. The court always retains jurisdiction over disputes between Malaysian parties. The validity of an agreement is for the court to decide and only the court can decide whether an agreement is *void ab initio* for non consideration. If the agreement is void there is no authority for any arbitrator to come in.

[17] The plaintiff denied ever having acceded to any arbitration. Even the KLRCA recognized that the matter had to be decided by the court before any arbitration. Therefore s. 34(1) of the AA 1952 did not apply. Furthermore, with the allegation of fraud apart from non-consideration to vitiate the agreement, arbitration would not be an appropriate forum.

[18] It was also submitted that this is not a proper case for striking out under O. 18 r. 19 on ground of lack of jurisdiction as the defendants did not in their pleadings deny that the court had jurisdiction. A

[19] Responding to the plaintiff's argument learned counsel for the defendants submitted that the plaintiff omitted to state that the claim has two limbs as also the striking out application is against both claims but the court only allowed the relief relating to the procurement contract in which the arbitration clause is prescribed. They had to defend the claim relating to the supply agreement which has no arbitration clause. B C

[20] It was contended that the arbitration clause itself empowers the arbitrator to determine the issue of validity and for the KLRCA Rules to apply to any dispute. The provision of s. 34(1) of the AA 1952 was thus triggered and the court's jurisdiction was ousted in determining the validity of the agreement. Learned counsel relied heavily on the decision of this court in *Sarawak Shell (supra)* which held that the effect of s. 34(1) of the Act is to leave no possibility of the court retaining any power to intermeddle in the arbitration at KLRCA. Arbitration is said to have commenced by virtue of art. 3 para. 2 of the KLRCA Rules which deems the arbitration proceedings to commence on the date on which the notice of arbitration is received by the party against whom the claim is initiated. And art. 21 para. 2 of the KLRCA Rules also empowers the arbitrator to determine the existence or validity of any arbitration agreement or clause. D E F

Our Conclusion

[21] The appeal being from an O. 18 r. 19 decision, we take guidance from the well settled principle applicable thereto. It is only in plain and obvious cases that recourse should be had to this summary process. The procedure can only be adopted when a claim is on the face of it 'obviously unsustainable'. If there is a point of law which requires serious discussion objection should be taken on the pleading and the point set down for argument. The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious. (See *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). G H I

[22] The submissions of learned counsel show that this is not a plain and obvious case in the defendants' favour. The pleadings reveal issues of law and fact which require determination. Indeed, the defendants did not deny this but preferred that they be resolved by arbitration. You also have the issues of whether the jurisdiction of the court is ousted by an arbitration clause in a contract, which existence or validity is challenged and whether the defendants who have submitted to the jurisdiction of the court thereby abandoning their rights to arbitration, can now deny the court's jurisdiction to determine the issue. The case is therefore neither on the face of it obviously unsustainable nor in the circumstances appropriate for disposal under O. 18 r. 19.

[23] In *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 the Federal Court rejected the argument of the appellant therein that the respondent did not have a cause of action against it since the respondent failed to refer their dispute to arbitration as required by the term of the agreement to arbitrate. It was held that the arbitration clause was never intended to oust the court's jurisdiction and that the respondent could still go to court provided no award had been made by an arbitrator. The appellant's conduct in not objecting to the respondent's recourse to court and by filing affidavits, statement of defence and counterclaim amounted to a waiver of its right to go to arbitration. The appellant's failure to have recourse to s. 6 of the AA 1952 reinforced the argument that it had abandoned its right to go to arbitration.

[24] In *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd* [1993] 4 CLJ 12, where the parties to a garnishment proceeding never questioned the court's jurisdiction and went ahead with the hearing, the Federal Court held that it was too late for the respondent/garnishee to raise the issue in the face of the arbitration clause in the contract that the court had no jurisdiction to hear the matter.

[25] In light of the high authorities there is nothing frivolous or vexatious in the plaintiff seeking determination by the court of the legal status of the procurement contract/arbitration clause, that being the source of the arbitrator's jurisdiction and power of resolving the dispute between them. The plaintiff did not abuse the court process by seeking redress there but the defendants did so by seeking to shut the plaintiff out after having themselves

opted to abandon their recourse to arbitration. On this ground alone this appeal should be allowed and the order of the learned JC set aside.

[26] Whether the court or the arbitrator determines the validity of an arbitration contract was considered by the Federal Court in *New India Assurance Company Ltd v. Lewis* [1966] 1 LNS 115. It was held as settled law that where the dispute is as to whether a contract which contains an arbitration clause in the widest and most usual form was entered into at all that issue cannot go to arbitration under the clause. The reason for that is attributed to the words of Viscount Simon LC in *Heyman v. Darwins* [1942] 1 All 337 that "the party who denies that he had ever entered into the contract is thereby denying that he ever joined in the submission" and to the words of Lord Mcmillan that "If there has never been a contract at all, there has never been in a part of it an agreement to arbitrate; the greater includes the less".

[27] In the context of the present case, as the very source of the arbitrator's authority is being challenged, he is yet to be clothed with the jurisdiction so as to enable him to exercise the power to determine the issue. It would otherwise be putting the cart before the horse.

[28] In *Tan Kong Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat* [1996] 1 CLJ 231 Gopal Sri Ram JCA, in delivering the judgment of the Federal Court, reiterated the common law position that a prior agreement between contracting parties to refer their dispute to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. However, the court could, in the exercise of its discretion, stay an action and require the plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration.

[29] The common law position was adopted by our AA 1952 which was enacted to regulate the procedures pertaining to arbitration as an alternative means of resolving disputes. Section 6 of the AA 1952 provides statutory recognition that the court retains its jurisdiction over disputes notwithstanding any agreement to arbitrate. The power to stay court proceedings is premised on the existence of an agreement to arbitrate and the disputes therein contemplated. The exercise of such discretion is conditional upon the application being made before any steps are taken in that

proceedings. That same position is in fact maintained in the Arbitration Act 2005 except that the new s. 10(1) now makes it mandatory to order a stay of court proceedings upon application being made, other conditions remaining but specifically prescribed.

[30] Article 21 of the KLRCA Rules no doubt empowers an arbitral tribunal to rule on objection to its jurisdiction or determine the existence or validity of an arbitration contract/clause. But as pointed out by Abdul Aziz Mohamed JCA in *Safege Consulting Engineers v. Ranhill Bersekutu Sdn Bhd* [2004] 4 CLJ 699 jurisdiction and power are distinguishable. "Even if an arbitrator has power to ... it is only a power, a remedy or a tool available to an arbitrator to use in his domain. But he must first have that domain, that jurisdiction. If he has not got the domain, the jurisdiction, the question of the power, remedy or, tool is irrelevant ... The power ... , if it exists, cannot confer jurisdiction that does not exist." The learned JC therefore erred in rejecting the plaintiff's submission that the court retains the jurisdiction to determine the issue at hand.

[31] The next issue is whether s. 34(1) of the AA 1952 applies in this case as cl. 7 of the procurement contract provides for settlement of any dispute by arbitration at the KLRCA. KLRCA was established with the objective of providing a system for settlement of dispute for the benefit of parties engaged in trade, commerce and investment in and within the Asian Pacific region with the primary functions to promote international commercial arbitration in the region and to render assistance in the enforcement of awards. This is stated in the introduction to the Arbitration Rules of the KLRCA (Revised August 2001). Section 34 was added to the AA 1952 in 1980 consequent to its establishment and in recognition of the independent and international nature and functions of the centre which fact must be borne in mind in construing the provision.

[32] This is acknowledged by Zakaria Yatim J (the first director of KLRCA who later became judge) in his judgment in *Klockner Industries - Anlagen GmbH v. Kien Tat Sdn Bhd & Anor* [1990] 1 LNS 70 where he said, "The arbitration centre is an independent international institution." In that case he opined that s. 34 of the AA 1952 precluded the High Court from exercising its supervisory jurisdiction as provided in the AA 1952 or other written law in respect of any arbitration held at the KLRCA. In

Soilchem Sdn Bhd v. Standard Electrik Lorenz AG [1992] 1 LNS 51 Abu Mansor J followed *Klockner* and held that the section was meant to exclude the jurisdiction of the court in such cases. In *Sarawak Shell* Mahadev Shanker JCA adopted *Klockner* and *Soilchem* and concluded that there is therefore no possibility that the court had some other power to intermeddle in the arbitration at the centre whether by way of inherent jurisdiction or common law or otherwise.

[33] In our view, reliance by the learned JC on *Sarawak Shell* is however misplaced as the situations and issues differ. In that case the existence or validity of the agreement to arbitrate was not in dispute nor was the jurisdiction of the KLRCA an issue. The plaintiff there also conceded that the arbitration proceedings at the KLRCA was in progress when court intervention was sought. Unlike the present case, both *Klockner* and *Soilchem* relied on by *Sarawak Shell* were concerned with applications made to court in the course of on going international arbitrations held at KLRCA.

[34] We agree with Mohd Ghazali Yusoff JCA in *Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd* [2004] 3 CLJ 591 that s. 34 of the AA 1952 only excludes interference with the arbitration itself. It does not extend to situations where the relief sought from the court is not supervisory in nature. (see also Dato PG Lim, the former Director of KLRCA (1982 - 2000) in her article entitled *Jati Erat Sdn Bhd v. City Land Sdn Bhd* [2001] MLJU 657 in, [2002] 1 CLJ 346 Revisited).

[35] In the instant case there was neither an ongoing arbitration held at the KLRCA nor an international arbitration as contemplated by s. 34, all parties being local companies. Though the AN was served on the plaintiff, the plaintiff had not submitted to KLRCA's jurisdiction. On the contrary, the source of the arbitrator's jurisdiction was challenged as being null and *void ab initio*. KLRCA itself admitted by its letter that no action would be taken by the centre pending direction of the court. There was no arbitration in progress at KLRCA. There is therefore no question of the court interfering with any arbitration at KLRCA so as to trigger the application of s. 34(1). In any event , the relief sought by the plaintiff before the court is not supervisory in nature.

[36] Be that as it may, cl. 7 of the procurement contract expresses the intention of the parties to refer their dispute to a domestic arbitration and not an international one, the governing law being specified as the laws of Malaysia. Local arbitration may

be conducted under the KLRCA Rules but s. 34 of the AA 1952 would not be triggered as that would be contrary to the parties' intention and the purpose of the section. The learned JC therefore erred in upholding the striking out of the plaintiff's claim on the ground that the court's jurisdiction was ousted by the arbitration clause and s. 34(1) of the AA 1952.

[37] On learned counsel's submission that the defendants had to file their statement of defence because of the claim in respect of the supply agreement which contained no arbitration clause, it is trite law that if a defendant has served any pleadings, then he has clearly taken a step in the proceedings and has thereby elected to proceed with the proceedings in court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration. (See *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213 FC)

[38] For the aforesaid reasons appellate interference was in order to rectify the decision of the learned JC who had not only misconstrued the law but also misappreciated the facts before her. We accordingly allowed the appeal and set aside the order of the High Court.